THE HON'BLE SRI JUSTICE B.PRAKASH RAO
AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

W.P.No.15352 of 2005

Date: 11.07.2006

Between:

N. Venkateswarlu and eight others.

... Petitioners.

And

Union of India rep. by its Secretary, Ministry of Railways, Rail Bhavan, New Delhi four others.

... Respondents.

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AND
THE HON'BLE SRI JUSTICE RAMESH RANGANATHAN

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JUDGMENT:(per Hon'ble Sri Justice Ramesh Ranganathan)

Petitioners, nine in number, seek to have the order of the Central Administrative Tribunal, in O.A.Nos.271, 310 and 311 of 2005 dated 8.6.2005, quashed. They seek a consequential direction to the respondents to consider their cases for absorption in accordance with the scheme framed by the Railway Board through Master Circular No.20 of 1991 and for grant of all such benefits that may flow out of such absorption.

Facts, in brief, are that pursuant to a notification dated 13.9.2002, issued by the 5th respondent to fill up the vacant posts of Assistant Teachers in Guntakal Division in various Railway High Schools and Primary Schools, the petitioners applied for being appointed to the said posts. They were subjected to a selection process and were selected by a duly constituted selection committee. All the petitioners were initially engaged during the period June 2003 to September 2003, they were granted temporary status in

March, 2004 except in the case of the 7th petitioner who was granted temporary status in November 2004. Petitioners submit that initially recruitment of teachers was done by the Railway Service Commission. This was decentralized in 1976 leaving it open to the respective zones and divisions to conduct the recruitment. Subsequently, in 1991, recruitment of teachers was entrusted to the Railway Recruitment Board. Pursuant to a notification issued by the Railway Recruitment Board on 6.9.2003, an examination was conducted on 5.12.2004 to fill up the vacancies and all the petitioners, except the 5th petitioner, appeared for the examination but could not be selected to form part of the final zone of selected candidates who were subjected to the process of interview. Interviews were completed on 19.2.2005, and the candidates selected. Petitioners submitted a representation on 28.10.2004 requesting the respondents not to fill up the vacancies by direct recruitment and instead to consider their cases for absorption in the said posts. Aggrieved by the action of the respondents in seeking to fill up the vacant posts of Assistant Teachers through direct recruitment, without considering their claims, the petitioners approached the Central Administrative Tribunal. The O.As. filed by them were dismissed by common judgment dated 8.6.2005.

A counter affidavit is filed by the Deputy Chief Personnel Officer, South Central Railway wherein it is stated that a notification was issued on 13.9.2002 by the 4th respondent for engaging substitute teachers, in the Railway Schools in the Guntakal Division, temporarily till such time the vacancies are filled up by regular candidates recruited by the Railway Recruitment Board or for a period of 3 months from the actual date on which the substitute teachers reported for duty whichever was earlier. The other terms and conditions enclosed to the notification stipulated that the engagement was temporary till the selected candidates from the Railway Recruitment Board were available. Respondents would state that the petitioners herein accepted the conditions, joined the post of Assistant Teachers and since selection of candidates under the notification dated 13.9.2002 was for the purpose of appointment of substitute teachers, such selection could not be applied for regular recruitment to be done by the Railway Recruitment Board through an All India Advertisement. It is stated that the petitioners herein were disengaged on completion of 89 days of service at the end of the academic year 2003-2004, they were re-engaged only at the beginning of classes for the academic year 2004-2005 and that their services were terminated on 21.4.2005 on completion of the academic year 2004-05. It is further stated that conferment of temporary status on them by the Divisional Personnel Officer, Guntakal on 06.04.2004 was only for the purpose of granting certain privileges available to temporary railway employees and it did not confer on them any claim for absorption, continuation, confirmation or seniority. Respondents would state that the Railway Recruitment Board has issued a notification dated 6.9.2003 for regular recruitment to fill up 56 posts of Assistant Teachers all over India, out of which 15 vacancies in Telugu medium and 15 vacancies in English Medium were for Guntakal Division. The selection process prescribed consisted of a written examination and a viva-voce test. The vacancies notified included the vacancies in which the petitioners were working on a temporary basis. It is further stated that eight of the nine petitioners appeared in the said selection process, but failed in the written examination. Pursuant to the recruitment, 15 Assistant Teachers of English medium and 15 Assistant Teachers in Telugu Medium are said to have been allotted to Guntakal Division by proceedings of the Chief Personnel Officer, Secunderabad dated 9.5.2005, that offers of appointment were made to the 15 selected candidates in English medium in June 2005, that out of the 15 selected candidates, 12 candidates had joined the post of Assistant Teachers, one candidate was found medically unfit and two others had not joined in the posts to which they were selected. However, no offer of appointment was made to the 15 Telugu medium posts of Assistant Teachers due to closure of Telugu medium schools and as such no vacancies exist in the Telugu medium posts of Assistant Teachers in Guntakal Division. In response to the petitioners' contention that some other teachers were regularized, it is stated that such regularization was on account of the Railway Board's decision to regularize the services of such substitute teachers who had

rendered more than 3 years of substitute service and that the petitioners cannot compare their cases with them since their appointment was with the clear stipulation that their services were terminable once regularly selected candidates become available. Respondents would contend that Master Circular No.20 is a compendium of instructions issued on the subject of substitutes engaged in various categories and it is not limited only to the category of substitute teachers. It is further stated that the petitioners services were terminated with effect from 21.4.2005 on the order of the South Central Railway and since regularly selected candidates had been offered appointment there was no vacancy existing in the category of Assistant Teachers in Guntakal Division.

The Tribunal, in its order in O.A.No. 271 of 2005 & batch dated 08.06.2005, referred to the notification dated 13.9.2002, to the terms and conditions prescribed thereunder, and to the offers of appointment made to the petitioners herein. The Tribunal referred to the memo dated 5/6th April 2004, wherein temporary status was granted to the petitioners, and to the terms and conditions of such grant which specifically provided that grant of temporary status would not confer on the petitioners any claim for absorption in any regular establishment and that their services were liable to be terminated a day before the date on which the school closed for the ensuing summer vacation or till they were replaced by regular candidates whichever was earlier. The Tribunal took note of the Master Circular No.20 and held that the petitioners, having failed in the written examination for appointment as regular teachers, could not seek back door entry by the method of screening committee which otherwise would be available in the case of substitute teachers. The Tribunal held that since it was a clear cut policy of the respondents that substitutes should not be appointed and even if they were appointed they should not be appointed for long periods and since within 3 months of appointment of the petitioners as substitute teachers, the respondents had issued a regular notification dated 6.9.2003, the question of the petitioners being denied their legitimate expectation did not arise. The Tribunal also referred to an earlier Circular dated 22.2.1989 which provided that conferment of temporary status on substitutes did not entitle them for automatic absorption/appointment to railway service unless they were in their turn for such appointment on the basis of their position in the select list. The Tribunal held that since the petitioners were duly put on notice, in respect of these conditions in the appointment letter, the question of their legitimate expectation having been denied did not arise. The O.As filed by the petitioners were accordingly dismissed.

Sri Nooty Ramamohan Rao, learned counsel for the petitioners, would refer to Clause 4.3 of the Master Circular No.20 which afforded temporary status to substitute teachers on their putting continuous service of three months. Clause 4.3 also mentioned that their services would be treated as continuous for all purposes except seniority on their eventual absorption against regular posts after selection. Clause 4.4 provided that conferment of temporary status after completion of four months continuous service, in the case of the substitute teachers mentioned in clause 4.3, did not entitle them to automatic absorption/appointment to Railway service unless they were selected in the approved manner for appointment or absorption in regular posts. Clause 5.1 provided that substitutes who had acquired temporary status should be screened by a Screening Committee and not by the Selection Boards constituted for the purpose before being absorbed in regular Group 'C' (Class III) and Group 'D' (Class IV) posts and that such Screening Committee shall consist of at least three members. Clause 5.5. provided that Screening of substitutes for absorption in regular employment may be made by the Screening Committee with reference to available vacancies and vacancies likely to arise in the next one year and available for absorption of Casual Labour. Learned counsel would submit that, in view of the aforesaid clauses in Master Circular 20, the respondents had a clear policy with regards engagement of substitute teachers and for their subsequent regularization and instead of following the procedure prescribed in the Master Circular and screening the substitute teachers by the Screening Committee, they were asked to undergo a regular process of selection and compete with direct recruits pursuant to the notification issued

by the Railway Recruitment Board. Learned counsel would submit that, since the petitioners herein have been working for the past nearly 3 years and since they have gained necessary experience as teaching assistants, it would be in the interests of Railway Schools to have their services regularized as Assistant Teachers instead of recruiting candidates through the Railway Recruitment Board.

Sri T. Ramakrishna Rao, learned Standing Counsel for the Railways, on the other hand, would rely on the Indian Railway Establishment Code which contains all the amendments to the Rules. Learned counsel would state that the Railway Establishment Code has been issued by the President in exercise of the powers conferred under the proviso to Article 309 of the Constitution of India. According to the learned counsel, since the Railway Establishment Code are rules made under the proviso to Article 309, reliance placed by the petitioners on the earlier executive instructions under Master Circular 20 is of no avail. Learned counsel would refer to Rule 101 and 123 of the Code which provides that the Railway Board shall have full powers to make rules of general application to Group C & Group D railway servants under their control. Learned counsel would refer to Rule 215 which prescribes the authorities competent to make first appointment and under Clause (a)(ii) are Group 'C' posts. Rule 216 provides that Group C and Group D posts in the Indian Railways shall be filled in either by direct recruitment, by promotion or by transfer and sub-Rule (2) thereof provides that direct recruitment to railway services shall be made through the agency of the Railway Recruitment Board unless otherwise specially authorized by the Railway Board. Learned Standing Counsel would refer to the Indian Railway Establishment Manual. Rule 101 thereunder prescribes the extent of its application. Rule 109 prescribes the method of making appointments and under clause (a) thereof, direct recruitment to fill up group 'C' posts will have to be made through the Railway Recruitment Board. Learned Standing Counsel would refer to Rule 178.1 which provides that recruitment of teachers in the Railway schools shall be made by the Railway Administration concerned. Learned counsel would also refer to a Circular dated 30.4.1999, which provides that recruitment of teachers must be through the Railway Recruitment Board, to submit that since these rules govern the field the earlier executive instructions issued in the Master Circular 20 can no longer be relied upon. Learned Standing Counsel would submit that the petitioners, on their appointment as substitute teachers, were informed that their appointment was only for a limited period till regular appointments were made. Learned Standing Counsel would refer to the Notification dated 13.9.2002, to other terms and conditions enclosed thereto, more particularly, Clause 1 therein, which prescribes that the services of the candidates selected as substitute teachers were terminable without any notice whatsoever as and when regular teachers were selected by the Railway Recruitment Board and were available for appointment and that such engagement of substitute teachers did not confer on them any claim for continuation, regular absorption or for regularization of their services. Learned counsel would submit that the very engagement of the petitioners herein was only in December 2003 and three months thereafter they were conferred temporary status. He would refer to the Memorandum dated 5/8 April 2004, (whereby temporary status was granted to substitute teachers including the petitioners), more particularly clauses 2,3 and 5 which provide that grant of temporary status shall not confer on them any claim for absorption in any regular establishment, continuation, conferment or seniority etc; that their services were liable to be terminated a day before the date on which the school closed for the ensuing summer vacation or till they were replaced by regular candidates whichever was earlier and that they had to appear in the Railway Recruitment Board examination, if any, in response to the advertisement issued from time to time and get selected for appointment as regular teachers in railways. Learned Standing Counsel would submit that since the notification inviting applications, the orders of appointment, the order granting them temporary status all provide that such appointment/conferment of temporary status would not confer on them any right to claim absorption and the petitioners were further informed that they had to undergo the selection process through the Railway Recruitment Board, the petitioners could not claim regularization or absorption of their services on the basis of screening by a Screening Committee prescribed in the Master Circular. Learned

standing counsel would further submit that the petitioners had participated in the regular selections but had failed in the written test and as such could not be considered for regular appointment. Learned Standing Counsel would submit that regular teachers have already been selected and as such the petitioners cannot claim absorption or regularization of their services. Learned counsel would place reliance on **The Railway Recruitment Board v. P.R. Subramaniyam**[1]; **J & K Public Service Commission v. Dr. Narinder Mohan**[2]; **Surinder Singh Jamwal v. The State of jammu & Kashmir**[3] and **Mahendra L. Jain v. Indore Development Authority**[4].

In **P.R.Subramaniyam**[1], the Supreme Court held that the decision of the Railway Board contained in letter dated 2.3.1962 which had the force of rules of general application to a particular class of non-gazetted railway servants and the force of a rule made under Rule 157 of the Code had overriding effect over the provisions contained in the Manual.

In **Narinder Mohan**[2], the Supreme Court held thus:

"..... It is true that the adhoc appointees have been continuing from 1986 onwards but their appointments are de hors the Rules. Rules prescribe only two modes of recruitment, namely, direct recruitment or promotion by selection. As regards the Lecturers are concerned, it is only by direct recruitment. The mode of recruitment suggested by the High Court, namely, regularisation by placing the service record of the respondents before the PSC and consideration thereof and PSCs recommendation in that behalf is -only a hybrid procedure not contemplated by the Rules. Moreover, when the Rules prescribe direct recruitment, every eligible candidate is entitled to be considered and recruitment by open advertisement which is one of the well accepted modes of recruitment. Inviting applications for recruitment to fill in notified vacancies is consistent with the right to apply for by qualified and eligible persons and consideration of their claim to an office or post under the State is a guaranteed right given under Arts. 14 and 16 of the Constitution. The direction, therefore, issued by the Division Bench is in negation of Arts. 14 and 16 and in violation to the statutory rules. The PSC cannot be directed to devise a third mode of selection, as directed by the High Court, nor be mandated to disobey the Constitution and the law....."

In the aforesaid judgment, the Supreme Court held that when the rules prescribed direct recruitment, every eligible candidate was entitled to be considered for recruitment by open advertisement and that inviting applications for recruitment to fill in the notified vacancies was consistent with the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India.

In **Surinder Singh Jamwal**[3], the Supreme Court held thus:

".....THE controversy raised in this case is squarely covered by the judgment of this Court reported in J. and K. Public Service Commission. Dr. Narinder Mohan, (1994) 2 SCC 630 : (1994 AIR SCW 1710). It is not in dispute that the appellants were recruited on ad hoc basis and have been continuing as such. It is their contention that since they had put in more than 13 years of service they are entitled to regularisation of service and approached the High Court for direction to regularise their services. The High Court has followed the ratio in the above judgment and dismissed the petition. In the light of the judgment of this Court the settled legal position now in that the recruitment to the service should be governed by the appropriate statutory rules. Under the rules the regular recruitment to the posts shall be made by the Public Service Commission. Consequently, the ad hoc appointments would be only temporary appointments dehors the rules, pending regular recruitment without conferring any right to regularisation of service....."

In the aforesaid judgment the Supreme Court held that where the recruitment to a service is governed by statutory rules, ad-hoc appointments made temporarily dehors the rules pending regular recruitment did not confer any right of regularization of service.

In **Mahendra L.Jain**[4], the Supreme Court held thus:

"..... The question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A State before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements....."

In the aforesaid judgment the Supreme Court held that regularization could not be claimed as a matter of right and that what could be regularized was an irregularity and not an illegality and that under the constitutional scheme back door appointments were not contemplated.

It is necessary in this regard to refer to the Constitution Bench judgment of the Supreme Court in **Secretary, State of Karnataka v. Umadevi**[5] wherein it has been held thus:

"…..**While directing that appointments, temporary or casual, be regularized or made permanent, courts are swayed by the fact that the concerned person has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with eyes open. It may be true that he is not in a position to bargain – not at arms length – since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible.** If the court were to void a contractual employment of this nature on the ground that the parties were not having equal bargaining power, that too would not enable the court to grant any relief to that employee. A total embargo on such casual or temporary employment is not possible, given the exigencies of administration and if imposed, would only mean that some people who at least get employment temporarily, contractually or casually, would not be getting even that employment when securing of such employment brings at least some succor to them. After all, innumerable citizens of our vast country are in search of employment and one is not compelled to accept a casual or temporary employment if one is not inclined to go in for such an employment. It is in that context that one has to proceed on the basis that the employment was accepted fully knowing the nature of it and the consequences flowing from it. **In other words, even while accepting the employment, the person concerned knows the nature of his employment. It is not an appointment to a post in the real sense of the term. The claim acquired by him in the post in which he is temporarily employed or the interest in that post cannot be considered to be of such a magnitude as to enable the giving up of the procedure established, for making regular appointments to available posts in the services of the State. The argument that since one has been working for some time in the post, it will not be just to discontinue him, even though he was aware of the nature of the employment when he first took it up is not one that would enable the jettisoning of the procedure established by law for public employment and would have to fail when tested on the touchstone of constitutionality and equality of opportunity enshrined in Article 14 of the Constitution of India.**

When a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, causal or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure for selection and in concerned cases, in consultation with the Public Service Commission. Therefore, the theory of legitimate expectation cannot be successfully advanced by temporary, contractual or casual employees. It cannot also be held that the State has held out any promise while engaging these persons either to continue them where they are or to make them permanent. The State cannot constitutionally make such a promise. It is also obvious that the theory cannot be invoked to seek a positive relief of being made permanent in the post.

It was then contended that the rights of the employees thus appointed, under Articles 14 and 16 of the Constitution, are violated. It is stated that the State has treated the employees unfairly by employing them on less than minimum wages and extracting work from them for a pretty long period in comparison with those directly recruited who are getting more wages or salaries for doing similar work. The employees before us were engaged on daily wages in the concerned department on a wage that was made known to them. There is no case that the wage agreed upon was not being paid. Those who are working on daily wages formed a class by themselves, they cannot claim that they are discriminated as against those who have been regularly recruited on the basis of the relevant rules. No right can be founded on an employment on daily wages to claim that such employee should be treated on a p**art with a regularly recruited candidate, and made permanent in employment, even assuming that the principle could be invoked for claiming equal wages for equal work. There is no fundamental right in those who have been employed on daily wages or temporarily or on contractual basis, to claim that they have a right to be absorbed in service. As has been held by this Court, they cannot be said to be holders of a post, since, a regular appointment could be made only by making appointments consistent with the requirements of Articles 14 and 16 of the Constitution.** The right to be treated equally with the other employees employed on daily wages, cannot be extended to a claim for equal treatment with those who were regularly employed. That would be treating unequals as equals. It cannot also be relied on to claim a right to be absorbed in service even though they have never been selected in terms of the relevant recruitment rules. The arguments based on Articles 14 and 16 of the Constitution are therefore overruled.

It is contended that the State action in not regularizing the employees was not fair within the framework of the rule of law. The rule of law compels the State to make appointments as envisaged by the Constitution and in the manner we have indicated earlier. Inmost of these cases, no doubt, the employees had worked for some length of time but this has also been brought about by the pendency of proceedings in Tribunals and courts initiated at the instance of the employees. Moreover, accepting an argument of this nature would mean that the State would be permitted to perpetuate an illegality in the matter of public employment and that would be a negation of the constitutional scheme adopted by us, the people of India. It is therefore not possible to accept the argument that there must be a direction to make permanent all the persons employed on daily wages. **When the court is approached for relief by way of a writ, the court has necessarily to ask itself whether the person before it had any legal right to been forced. Considered in the light of the very clear constitutional scheme, it cannot be said that the employees have been able to establish a legal right to be made permanent even though they have never been appointed in terms of the relevant rules or in adherence of Articles 24 and 16 of the Constitution.**

It is argued that in a country like India where there is so much poverty and unemployment and there is no equality of bargaining power, the action of the State in not making the employees permanent, would be violative of Articles 21 of the Constitution. But the very argument indicates that there are so many waiting for employment and an equal opportunity for competing for employment and it is in that context that the Constitution as one of its basic features, has included Articles 14, 16 and 309 so as to ensure that public employment is given only in a fair and equitable manner by giving all those who are qualified, an opportunity to seek employment. In the guise of upholding rights under Article 21 of the Constitution of India, a set of persons cannot be preferred over a vast majority of people waiting for an opportunity to compete for State employment. The acceptance of the argument on behalf of the respondents would really negate the rights of the others

conferred by Article21 of the Constitution, assuming that we are in a position to hold that the right to employment is also a right coming within the purview of Article 21 of the Constitution. The argument that Article 23 of the Constitution is breached because the employment on daily wages amounts to forced labour, cannot be accepted. After all, the employees accepted the employment at their own volition and with eyes open as to the nature of their employment. The Governments also revised the minimum wages payable from time to time in the light of all relevant circumstances. It also appears to us that importing of these theories to defeat the basic requirement of public employment would defeat the constitutional scheme and the constitutional goal of equality.

The argument that the right to life protected by Article 21 of the Constitution of India would include the right to employment cannot also be accepted at this juncture. The law is dynamic and our Constitution is a living document. May be at some future point of time, the right to employment can also be brought in under the concept of right to life or even included as a fundamental right. The new statute is perhaps a beginning. As things now stand, the acceptance of such a plea at the instance of the employees before us would lead to the consequence of depriving a large number of other aspirants of an opportunity to compete for the post or employment. Their right to employment if it is a part of right to life, would stand denuded by the preferring of those who have got in casually or those who have come through the back door. The obligation cast on the State under Article 39(a) of the Constitution of India is to ensure that all citizens equally have the right to adequate means of livelihood. It will be more consistent with that policy if the courts recognize that an appointment to a post in government service or in the service of its instrumentalities, can only be by way of a proper selection in the manner recognized by the relevant legislation in the context of the relevant provisions of the Constitution. In the name of individualizing justice, it is also not possible to shut our eyes to the constitutional scheme and the right of the numerous as against the few who are before the court. The Directive Principles of State Policy have also to be reconciled with the rights available to the citizen under Pat III of the Constitution and the obligation of the State tone and all and not to a particular group of citizens. We, therefore, overrule the argument based on Article 21 of the Constitution……" (emphasis supplied)

In the case on hand, the notification inviting applications to fill up the posts of substitute teachers, the order of appointment issued in favour of the petitioners, the order whereby they were granted temporary status all specifically provide that their services were purely temporary, that it did not confer on them any right for regularization or absorption and that they should undergo a regular process of selection to be conducted by the Railway Recruitment Board, if they were to be appointed as regular teachers. Since the petitioners were all the while aware that their appointment was pending regular appointment by way of direct recruitment through the Railway Recruitment Board, they cannot claim absorption as a matter of right nor can they rely on the executive instructions in Master Circular No.20 to contend that they should be absorbed by a process of screening by a Screening Committee. It is not as if the petitioners herein were prevented from participating in the regular selection. In fact, except one, all the other petitioners appeared in the written examination, conducted by the Railway Recruitment Board, but were unsuccessful and as such could not be selected. Since regular candidates have already been selected for appointment as Assistant Teachers, and most of them have already joined, the question of continuing the services of the petitioners or regularizing their services does not arise. The order of the Central Administrative Tribunal, rejecting the petitioners' request in this regard, is in accordance with law and does not call for interference.

The writ petition fails and is accordingly dismissed. However, in the circumstances, without costs.

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B.PRAKASH RAO,J

Date: -07-2006

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RAMESH RANGANATHAN,J

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[1] AIR 1978 SC 284

[2] 1994(1) SLR 246

[3] 1996(5) SLR 170

[4] 2005(1) SLR 39

[5] 2006(4) SCC 1